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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970

NO. 964

JACK VAN SICKLE,
Petitioner,

v.

THE STATE OF NEVADA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF NEVADA

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THE STATE OF NEVADA,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The petitioner, JACK VAN SICKLE, prays that a writ of certiorari issue to review the final order and opinion of the Supreme Court of the State of Nevada rendered in these proceedings.

OPINION BELOW

The final order and the majority and dissenting opinions of the Supreme Court of the State of Nevada are reported at 471 P.2d 224 (No. 6205, July 1, 1970) and attached hereto as Appendix A, p. 17. An order of the Supreme Court of the State of Nevada denying petitioner's motion for rehearing was entered on August 18, 1970, and is attached hereto as Appendix B, p. 28.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(3), and Rule 19, ¶1(a), of the Rules of the Supreme Court of the United States

The certified record and this petition have been timely filed and docketed under the provisions of 28 U.S.C. §2101 and Rules 21 and 22 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Was petitioner denied equal protection of the laws by a Nevada Supreme Court decision that his status as an arrestee under an executive warrant of extradition to answer a criminal charge in California precluded him from invoking Nevada's constitutional and statutory provisions authorizing admission to bail pending a habeas corpus proceeding asserting lack of probable cause for issuance of the warrant?

2. Was petitioner unreasonably denied the right to bail in violation of the Eighth Amendment to the United States Constitution?

3. Was petitioner's assertion in habeas corpus proceedings of his constitutional right to a determination whether his arrest was supported by probable cause unreasonably impeded and chilled by the Nevada Supreme Court's decision that petitioner has no standing to apply for and be admitted to bail but must be held in jail while asserting such constitutional right?

CONSTITUTIONAL AND STATUTORY PROVISIONS*

United States Constitution, Article IV, §2, ¶2:

> "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found

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* Other statutory provisions having some relation to this case but which are not central to the constitutional questions raised appear in Appendix C, p. 29.

in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Amendment XIV, §1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Nevada Constitution, Article 1, §7:

"All persons shall be bailable by sufficient sureties, unless for Capital Offenses when the proof is evident, or the presumption great."

Nevada Revised Statutes, §34.360:

"Every person unlawfully committed, detained, confined or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint."

Nevada Revised Statutes, §34.530:

> "Whenever any person may be imprisoned or detained in custody on any criminal charge, for want of bail, such person shall be entitled to a writ of habeas corpus for the purpose of giving bail, upon averring that fact in his petition, without alleging that he is illegally confined."

Nevada Revised Statutes, §179.197:

> "1. No person arrested upon such warrant [governor's warrant of arrest in extradition] shall be delivered over to the agent whom the executive authority demanding him has appointed to receive him unless he is first taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel.
>
> "2. If the prisoner or his counsel state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus.
>
> "3. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody and to the agent of the demanding state."

STATEMENT OF THE CASE

Petitioner, a long-time resident of Nevada, is the subject of extradition proceedings brought by California on a criminal complaint charging him with conspiracy to commit murder.

Petitioner seeks review by certiorari of the majority opinion and order of the Nevada Supreme Court vacating a lower court order admitting him to bail pending his habeas corpus proceeding asserting lack of probable cause to support the executive warrant of arrest issued against petitioner by the Governor of Nevada.

The following proceedings were had in the lower courts:

Petitioner brought a habeas corpus proceeding in the Second Judicial District Court of the State of Nevada asserting that the warrant of extradition issued against him by the Governor of Nevada was not supported by probable cause and violated petitioner's rights under the Fourth Amendment to the United States Constitution. (R. doc. #17, penciled page Nos. 1-36.)

Petitioner applied for bail during the pendency of this proceedings (R. doc. #17, penciled page Nos. 37-39), invoking the provisions of Article 1, §7, of the Constitution of Nevada that: "All persons shall be bailable by sufficient sureties, unless for Capital Offenses when the proof is evident, or the presumption great", and the statutes of Nevada on habeas corpus and bail under which every person unlawfully commited, detained, confined or restrained of his liberty, under any pretense whatever, has the right to prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint,[1] a provision making the writ of habeas corpus available for the purpose of giving bail to any person imprisoned or detained in custody on any criminal charge,[2] and a provision in Nevada's Uniform Criminal Extradition Act specifying that no person arrested on a governor's warrant in extradition shall be delivered to the agent of the demanding state until he has been taken before a judge of a court of record, informed of the demand made for his surrender and the crime charged against him, informed of his right to legal counsel, and accorded the right to test the legality of his arrest in habeas corpus.[3]

On March 26, 1970, the district court in which the habeas corpus proceeding was pending admitted petitioner to bail (R.

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1. *Nevada Revised Statutes*, §34.360, Constitutional and Statutory Provisions, p. 3.

2. *Nevada Revised Statutes*, §34.530, Constitutional and Statutory Provisions, p. 4.

3. *Nevada Revised Statutes*, §179.197, Constitutional and Statutory Provisions, p. 4.

doc. #44). Five days later, on March 31, 1970, the Attorney General of Nevada filed a petition in certiorari in the Nevada Supreme Court for review of the order admitting petitioner to bail, alleging, generally, that the order was contrary to Nevada law and exceeded the district court's jurisdiction (R. doc. #1).

There is no statute in Nevada which prohibits the granting of bail to persons held under executive warrants of extradition. To support his petition for certiorari, the Attorney General relied on (1) the circumstance that Nevada's Uniform Criminal Extradition Act[4] is silent on the subject of bail after a governor's warrant is issued; (2) the further circumstance that bail is accorded under the Uniform Criminal Extradition Act to persons held under fugitive warrants unless the prisoner is charged with an offense shown to be punishable by death or life imprisonment in demanding state;[5] and the extradition clause of the United States Constitution.[6]

Petitioner, as the real party in interest, filed a response to the Attorney General's petition for certiorari setting forth, inter alia, that the order admitting petitioner to bail was an entirely proper exercise of the district court's jurisdiction, duties and discretion under Nevada's constitutional and statutory provisions for bail and habeas corpus (R. doc. #4).

Petitioner also filed a motion to dismiss the Attorney General's petition on the ground, among others, that review of an order admitting an arrestee to bail would violate the Due Process and Equal Protection Clauses of the Fourteenth Amend-

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4. *Nevada Revised Statutes*, §§179.177 to 179.235.

5. *Nevada Revised Statutes*, §179.209, Appendix C, p. 30. In California a conspiracy to commit a felony is punishable in the same manner and to the same extent as the felony itself and first degree murder, at the discretion of the trier of the facts, may be punished by death. (*California Penal Code*, §§182.1, 187 and 190, Appendix C, p. 29.) In Nevada, a conspiracy to commit a crime is a gross misdemeanor punishable by imprisonment in the county jail for not more than one year, or a fine of not more than $1,000.00, or both. (*Nevada Revised Statutes*, §§199.140 and 199.480, Appendix C, pp. 29, 30.)

6. *Article IV*, §2, ¶2, Constitutional and Statutory Provisions, p. 2.

ment of the United States Constitution (R. doc. #6). This constitutional issue was briefed and discussed under Point Three of the Argument and Authorities Supporting Motion to Dismiss (R. doc. #6, pp. 12-18), and also under Point IV of the Reply to Memorandum Opposing Motion to Dismiss (R. doc. #18, pp. 8-16).

The Attorney General's Reply and Supplemental Points and Authorities place great reliance on the extradition clause of the Federal constitution as prohibiting the application of Nevada's law of bail to any person held under an executive warrant of extradition (R. doc. #9). In the Reply to Petitioner's Memorandum Opposing Motion to Dismiss, the issue of the impact of the extradition clause of the United States Constitution is briefed and argued on behalf of Mr. Van Sickle (R. doc. #18, pp. 2-4), and his rights under the Fourth Amendment and the Due Process and Equal Protection clauses of the Fourteenth Amentment to the Constitution of the United States are further briefed and argued therein under the point: A person arrested pursuant to an executive warrant of extradition has a right to be admitted to bail under the laws of the asylum state the same as any other person held on a criminal charge; any infringement of that right violates the Fourth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution (R. doc. #18, pp. 8-16).

The Nevada Supreme Court granted certiorari and the majority opinion of three of the justices held petitioner's status as an arrestee under an executive warrant of extradition precluded him from invoking Nevada's constitutional and statutory provisions on bail. The order admitting petitioner to bail was held to exceed the jurisdiction of the district court and was vacated (Appendix A, pp. 29).

The majority opinion relies on (1) the circumstance that the Uniform Criminal Extradition Act makes no provision for bail after the governor has issued his warrant; (2) a "presumption" that bail should be precluded after the issuance of

the governor's warrant arising from the circumstance that under the Act a fugitive who has been charged with a capital crime in the demanding state may not be admitted to bail prior to the issuance of the governor's warrant; (3) other state court decisions holding that the language of their particular constitutional provisions extends the right of bail only to those persons who are charged with a crime under the substantive laws of such states; and (4) a doctrine of paramount authority applied to the extradition clause of the United States Constitution and congressional power thereunder.

A dissenting opinion filed by the two remaining justices of the Nevada Supreme Court expressed the views that (1) no legislative grant of power is essential before a court in Nevada may grant bail in an extradition matter; (2) that Nevada's constitutional provision on bail is not confined to persons in custody for crimes committed in Nevada and does not exclude persons in custody by reason of an extradition proceeding or preclude bail to one charged with a capital offense where the proof is not evident nor the presumption great; (3) that the court's power to grant bail stems from Nevada's constitutional provisions and may not be diminished by legislative action or an interpretation of legislative silence; and (4) that nothing contained in the United States Constitution, Article IV, §2, concerning interstate extradition, touched the problem before the court. The dissent also points out that Nevada's Uniform Criminal Extradition Act contemplates habeas to test the legality of arrest under executive warrant,[7] that habeas is expressly made available for the purpose of giving bail to one in custody on "any" criminal charge,[8] and that the meaning of these provisions is denied by a holding that the court has no power to grant bail after an executive warrant has issued — a holding which also "places a penalty upon the fugitive's right

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7. *Nevada Revised Statutes*, §179.197, Constitutional and Statutory Provisions, p. 4.

8. *Nevada Revised Statutes*, §34.530, Constitutional and Statutory Provisions, p. 4.

to challenge the legality of his arrest and might effectively force a waiver of that right since the price of exercising it — jail, until his challenge is resolved by the court — may be too great". The dissenting justices concluded that in passing on an application for bail where a capital offense is charged, the determination of whether the proof is evident is discretionary and not reviewable by certiorari, a writ concerning only jurisdiction, that the proceeding should have been dismissed. (Appendix A, pp. 24).

Mr. Van Sickle's Petition for Rehearing charged that the majority opinion of the Nevada Supreme Court is contrary to the Constitution and laws of Nevada and denies equal protection of the laws to Mr. Van Sickle (R. doc. #24).

The Petition for Rehearing was denied by the Nevada Supreme Court (Appendix B, p. 28).

ARGUMENT

A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THE UNITED STATES SUPREME COURT HAS BEEN DECIDED BY THE STATE COURT CONTRARY TO PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES AND NOT IN ACCORD WITH APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT.

The central issue raised by this petition is whether the State of Nevada denied the equal protection of its laws to petitioner by holding he had no standing to claim the benefit of its constitutional and statutory provisions for admission to bail while asserting his Fourth Amendment and statutory right to test the existence of probable cause to support the issuance against him of a governor's warrant of extradition.

This question has never heretofore been decided by the United States Supreme Court.

This is an important federal question of substance which involves the Equal Protection Clause, the Extradition Clause, Nevada's Uniform Criminal Extradition Act,[9] and the prin-

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9. *Nevada Revised Statutes*, §§179.177-179.235, enacted in 1967. The *Uniform Criminal Extradition Act* has been adopted in nearly all of the States and territories. See 9 *Uniform Laws Annotated*, 1967 Cumulative Annual Pocket Part, p. 143.

ciples of presumption of innocence and right to bail implicit in the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

There are two broad reasons why this question has not heretofore been raised and determined by the United States Supreme Court. In the first place, federal concern in this general area arose out of the relatively recent decisions in *Wolf v. People of State of Colorado* (1949) 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, under which Fourth Amendment requirements were made applicable to the States through the Fourteenth Amendment, and *Mapp v State of Ohio* (1961) 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, which made Fourth Amendment requirements enforceable against the States by the same sanctions and by application of the same constitutional standards which prohibit unreasonable searches and seizures by the federal government. The impact of these decisions on the States with reference to arrests in extradition proceedings is the subject of *Kirkland v Preston* (C.A., Dist. Col., 1967) 385 F.2d 670, where it is also pointed out that only the decisions since *Wolf* and *Mapp*, (as, for example, *Beck v State of Ohio* (1964) 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed2d 142 and *Ker v State of California* (1963) 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726) have made it clear that *Wolf* and *Mapp* applied the whole of the Fourth Amendment to the States. Moreover, it is only recently that the dimensions and impact upon the States of the Eighth Amendment have begun to be developed; so far, these Eighth Amendment developments are adjudicated only in decisions of the United States Circuit Courts of Appeal and United States District Courts.[10]

The second reason for the novelty of the issue raised herein

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10. See, for example: *U.S. ex rel. Fink v Heyd* (D.C., La., 1968) 287 F.Supp. 716, aff'd: (CA 5th, 1969) 408 F.2d 7; *Mastrian v Hedman* (CA 8th, 1964) 326 F.2d 708, *cert. den.* 376 U.S. 965, 84 S.Ct. 1128, 11 L.Ed.2d 982; *Goodine v Griffin* (D.C., Ga., 1970) 309 F.Supp. 590; *Hernandez v Heyd* (D.C., La., 1970) 307 F.Supp. 826; *U.S. ex rel. Shakur v Com'r of Corrections* (D.C. N.Y., 1969) 303 FSupp. 303; *U.S. ex rel. Smith v Prasse* (D.C., Pa., 1967) 277 F.Supp. 391.

arises out of the fact that although many States have passed on the question whether a right of bail exists pending extradition, those states having an unlimited or unclassified constitutional and statutory right of bail have allowed persons under executive warrants of extradition to be admitted to bail, so that no Equal Protection question arose. See, for example:

Winnick v Reilly (Conn., 1924) 132 Atl. 440

Application of Haney (Idaho, 1955) 289 P.2d 945

People ex rel. Meeker v Baker (N.Y., 1910) 139 App. Div. 471, 124 N.Y.S. 47

Ruther v Sweeney (Ohio, 1956) 137 N.E.2d 292

Ex parte Anderson (Tex.Crim.App., 1938) 113 S.W.2d 551

In other states, the constitutional or statutory provisions on the right of bail are either expressly applicable or have been construed to be applicable only to persons charged with substantive crimes against that state and bail has not been extended to persons held under executive warrants of extradition. See, for example:

Waller v Jordan (Ariz., 1941) 118 P.2d 450

Buchanan v State ex rel. Weiss (FlaApp., 1964) 166 So.2d 596

State ex rel. Stringer v Quigg (Fla., 1926) 107 So. 409

Allen v Wild (Iowa, 1957) 86 N.W.2d 839

These cases appear to pose an Equal Protection Clause issue, since any form of unreasonable and arbitrary discrimination by a State — executive, legislative or judicial — is equally offensive to the Equal Protection Clause (*Cooper v Aaron* (1958) 358 U.S. 18, 78 S.Ct. 1401, 32 L.Ed.2nd 5); but, apparently, the issue went unrecognized or, if the issue were raised, it was not pursued beyond the level of the State court decision.

The chilling and impeding effect which the denial of bail has on a person asserting his constitutional right to test the

existence of probable cause for his arrest in extradition proceedings is demonstrated by the very fact that the Equal Protection Clause issue posed in the cases from Arizona, Florida and Iowa has lain dormant for so long. As is pointed out by the justices who dissented from the Nevada Supreme Court's decision on petitioner's case, a refusal to accord this right of bail "places a penalty upon the fugitive's right to challenge the legality of his arrest and might effectively force a waiver of that right since the price of exercising it — jail, until his challenge is resolved by the court — may be too great."[11]

The substantiality of the federal questions raised herein reside not alone in the constitutional protections invoked by the petitioner, nor in the impact which the resolution of the issues will have in the field of interstate extradition; substantiality also arises from the situational plight of persons arrested under warrants of extradition. Thus, the decision in *Kirkland v Preston,* supra, 385 F.2d, pp.676, 677, that Fourth Amendment considerations require rendition in extradition to be deferred until the executive and judicial authorities of the asylum state are satisfied the demand for extradition is based on probable cause, is amplified by the following discussion of that situational plight:

> "The law appreciates the hardships which extradition can involve: not only the suspension of one's liberty, but his deportation from the state in which he lives into another jurisdiction which may be hundreds of miles from his home. The law accordingly surrounds the accused with considerable procedural protection to stave off wrongful rendition. It is consistent with this concern for the accused's just treatment to recognize his right to require official confirmation of probable cause in the asylum state before extradition. This right to probable cause confirmation seems especially appropriate in view of the fact that the accused will have no access to an evidentiary prelim-

11. Appendix A, p. 27.

minary hearing on probable cause until he finally arrives in the accusing jurisdiction.

"In addition, the interests of the asylum state are advanced by its own probable cause determination. For it would be highhanded to compel that jurisdiction to lend its coercive authority, and the processes of its law, against even its own citizens in aid of an enterprise the key details of which remain in the dark. If, as here, it turns out that the prosecution against the fugitive is unfounded, the asylum state will have expended its resources and given the legitimizing stamp of its judiciary to a cause which is at best futile, as worst arbitrary.

"Recognizing a probable cause requirement . . . conflicts with no compelling interests elsewhere in the legal system. If the demanding state does have probable cause data, it will be no real inconvenience to record this evidence in the extradition papers. Documenting probable cause in an affidavit is what the policeman . . . must do if he is to secure an ordinary warrant for an arrest or search. And governors, or habeas corpus judges, will hardly be significantly burdened by having to study written submissions for probable cause in extradition cases."

Petioner's Fourth Amendment right to test the existence of probable cause in habeas corpus is codified by Nevada's Uniform Criminal Extradition Act,[12] and recognized by the Nevada Supreme Court. *Sheriff, Clark County v Thompson* (Nev., 1969) 452 P.2d 911.

The full, equal and unimpeded assertion of this constitutional right includes the right to release on bail under Article I, §7 of the Constitution of Nevada providing: "All persons shall be bailable by sufficient sureties, unless for Capital Offenses when the proof is evident, or the presumption great." By this provision persons charged with a capital offense are entitled to

12. *Nevada Revised Statutes*, §179.197, Constitutional and Statutory Provisions, p. 4.

be admitted to bail where the proof is not evident nor the presumption great. *Ex parte Wheeler* (1965) 81 Nev. 495, 406 P.2d 713.

Nevada statutes enacted to accommodate the constitutional provision for bail provide that every person restrained of his liberty under "any pretense whatever" may petition for habeas;[13] habeas is expressly made available for the purpose of giving bail to one in custody on "any" criminal charge.[14] Nothing in any of these provisions excludes persons in custody by reason of extradition proceedings.

The right of admission to bail before conviction is vital to the assertion of petitioner's constitutional rights and is preserved and protected under the Eighth Amendment. This court stated in *Stack v Boyle* (1951) 342 U.S. 1, 72 S.Ct. 1, 20 L.Ed.2d 917:

> ". . . This traditional right to freedom before conviction permits unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 1895, 156 U.S. 277, 285, 15 S.Ct. 450, 453, 39 L.Ed 424. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."

The Extradition Clause, Article IV, §2, ¶2, United States Constitution, has no inhibitory effect on the Bill of Rights or the Fourteenth Amendment. This Court has apparently never made any pronouncement thereon, but a contention of inter-constitutional conflict was dealt with in the case of *Johnson v Matthews* (1950) U.S.App.D.C. 376, 182 F.2d 677, cert. den., 340 U.S. 828, 71 S.Ct. 65, 95 L.Ed. 608, as follows:

> "It is said that this case presents a conflict between provisions of the Constitution. It presents no such con-

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13. *Nevada Revised Statutes*, §34.360, Constitutional and Statutory Provisions, p. 3.

14. *Nevada Revised Statutes*, §34.330, Constitutional and Statutory Provisions, p. 4.

flict. The extradition clause is a procedural provision. It does not impinge upon any substantive right of any individual and does not affect any provision of the Constitution or its Amendments protecting such rights . . .

". . . . A fugitive has neither more nor less constitutional rights than has an incarcerated prisoner."

To the same effect, see *Application of Middlebrooks* (D.C., Cal., 1950) 88 F.Supp. 943, rev'd on other grounds, 188 F.2d 308, cert. den., 342 U.S. 862, 72 S.Ct. 90, 96 L.Ed. 649.

An evidentiary hearing was held before the trial court which, by its ruling admitting petitioner to bail, determined that although he was charged with an offense which could constitute a capital offense in the State of California, the proof thereof was not evident nor the presumption great. This determination was a matter resting in the jurisdiction and judicial discretion of the trial court and not subject to appeal, *Ex parte Wheeler*, supra, nor reviewable by certiorari which in Nevada is restricted to jurisdictional defects, *Marshall v District Court* (1963) 79 Nev. 280, 382 P.2d 214.

Nevertheless, despite the clarity of petitioner's right to bail before conviction under the Eighth Amendment and under the constitution and statutes of Nevada, and despite the command of the Fourteenth Amendment entitling petitioner to equal protection of the laws of Nevada, the Nevada Supreme Court, in certiorari proceedings, arbitrarily and discriminatorily ruled that petitioner's status precluded him from being admitted to bail and wrongfully vacated a valid order of the trial court admitting him to bail.

The action of the Supreme Court of Nevada unreasonably and arbitrarily penalized petitioner in the assertion of his Fourth Amendment rights on the issue of probable cause by allowing such assertion to be made only at the cost of petitioner's imprisonment without bail, in contravention of the doctrine that if a law or judicial determination has no other purpose than to chill the assertion of constitutional rights by penalizing those

who choose to exercise them, then it is patently unconstitutional. *United States v Jackson* (1968) 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138; *Shapiro v Thompson* (1969) 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; *Williams v Oklahoma City* (1969) 395 U.S. 458, 89 S.Ct. 1818, 23 L.Ed.2d 440; and *North Carolina v Pearce* (1969) 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and petitioner should be restored to his rights under the Constitution of the United States and the laws of the State of Nevada.

Respectfully submitted:

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 6205

THE STATE OF NEVADA,
Petitioner,

vs.

SECOND JUDICIAL DISTRICT COURT, STATE OF NEVADA, COUNTY OF WASHOE,
Respondent.

July 1, 1970

Original proceeding in certiorari.

The order of the district judge is vacated.

Thompson and Zenoff, JJ., dissented.

Harvey Dickerson, Attorney General; *Daniel R. Walsh*, Chief Deputy Attorney General; and *Michael Melner*, Deputy Attorney General, of Carson City, for Petitioner.

Peter Echeverria and *Eli Grubic*, of Reno, and *Harry E. Claiborne* and *Annette R. Quintana*, of Las Vegas, for Respondent.

OPINION

By the Court, MOWBRAY, J.:

We have been asked in this certiorari proceeding to review the order of the district judge granting bail to Jack Van Sickle, who is a fugitive from justice from the State of California, where

he has been charged with conspiracy to murder six persons, a capital offense under sections 182.1, 187, and 190 of the California Penal Code.[1] He was charged by criminal complaint on December 2, 1969, in the Municipal Court, Modesto Judicial District, County of Stanislaus, State of California, and a warrant for his arrest was issued on that date.

Van Sickle was apprehended in Nevada as a fugitive and was committed to jail to enable his arrest "under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense," as provided in NRS 179.207 of the Uniform Criminal Extradition Act.[2] Since the

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1. West's Ann. Cal. Penal Code § 182:

"If two or more persons conspire:

"1. To commit any crime.

". . .

"They are punishable as follows:

"When they conspire to commit any crime against the person of any official specified in subdivision 6, they are guilty of a felony and are punishable by imprisonment in the state prison for not less than 10 years.

"When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony . . ."

West's Ann. Cal. Penal Code § 187:

"Murder is the unlawful killing of a human being, with malice aforethought."

West's Ann. Cal. Penal Code § 190:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life."

2. NRS 179.207:

"If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under NRS 179.189, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such time, not exceeding 30 days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused gives bail as provided in NRS 179.209, or until he is legally discharged."

crime with which Van Sickle was charged was punishable by death or life imprisonment under the laws of the demanding state, California, he was denied bail pending the issuance of the governor's warrant. NRS 179.209.[3] On February 16, 1970, the Governor of Nevada issued an executive warrant commanding the Nevada authorities to deliver Van Sickle to a designated California agent, so that he could be conveyed to California to stand trial in that state.

The Uniform Criminal Extradition Act provides, however, that before such a transfer of custody may be effected the defendant named in the extradition warrant must be taken before a judge of a court of record, who shall inform him of his rights and, in particular, advise the defendant that he may test the legality of his arrest by habeas, and that if he so desires he shall be allowed a reasonable time within which to do so before he is delivered to the agent from the demanding state. NRS 179.197.[4]

3. NRS 179.209:

"Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the governor of this state."

4. NRS 179.197:

"1. No person arrested upon such warrant [governor's warrant of arrest] shall be delivered over to the agent whom the executive authority demanding him has appointed to receive him unless he is first taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel.

"2. If the prisoner or his counsel state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus.

"3. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the agent of the demanding state."

5. Indeed, Van Sickle petitioned the district judge for bail after he was apprehended as a fugitive and prior to the issuance of the governor's warrant. His request for bail was denied. NRS 179.209, supra.

Van Sickle indicated his desire to file a habeas petition as so provided, and he did so on March 16, 1970. In addition, he filed a "Petition for Admission to Bail' on the same day. The district judge granted the latter petition and fixed bail in the sum of $10,000, from which order the State seeks review, claiming that the district judge exceeded his jurisdiction in entering the order. We agree.

NRS 179.209 of the Uniform Criminal Extradition Act, supra, provides that a fugitive may be admitted to bail in all cases, unless the offense charge is punishable by death or life imprisonment, pending the issuance of the governor's warrant for the fugitive's arrest. The statute makes no provision for bail after the governor has issued his warrant.[5] Van Sickle argues, however, that the statutory mandate denying bail in extradition proceedings in capital cases extends only until the issuance of the governor's warrant; and that therefore, regardless of the offense charged, a fugitive may be admitted to bail. We do not agree. Although NRS 179.209 of the Uniform Criminal Extradition Act sets forth the conditions when a fugitive may be admitted to bail during extradition proceedings, it covers only the period from the fugitive's arrest to the issuance of the governor's warrant, and not the period thereafter. We do not interpret such silence as an indication by the Legislature that all fugitives may, after the issuance of the governor's warrant, be admitted to bail. If a fugitive under the Act who has been charged with a capital crime in the demanding state may not be admitted to bail prior to the issuance of the governor's warrant, the presumption is much stronger that bail should be precluded after the issuance of the governor's warrant. Other jurisdictions have so held. In Allen v. Wild, 86 N.W.2d 839, 841-842 (Iowa 1957), a case where the fugitive was arrested on an executive warrant and admitted to bail, as in this case, the court said:

"The right of interstate extradition is founded in Section 2 Article IV, of the Constitution of the United States, which provides: 'A Person charged in any state with * * * Crime, who

shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.' Pursuant thereto, effectuating federal statutes have been adopted and what is now Chapter 759, Code of Iowa, 1954, I.C.A. entitled, Uniform Criminal Extradition Act, has been enacted. [Citations]

". . . With reference to extradition, section 759.16 provides that the prisoner, unless charged with an offense punishable by death or life imprisonment under the laws of the demanding state, may be admitted to bail by bond. However this section is applicable only while the person is being held to await requisition and before the warrant for his arrest is issued by the Governor. The chapter contains no similar provision for bail after the arrest upon such warrant. Hence it may be fairly inferred the omission of such provision was intentional." (Emphasis added.)

The Arizona Supreme Court in Waller v. Jordan, 118 P.2d 450, 452 (Ariz. 1941), a case analogous to the instant one, ruled:

"It will be noticed that if the county attorney on behalf of the state appeals, the court may admit the petitioner to bail pending the appeal. If, however, the petitioner appeals from the order refusing his discharge, the statute is silent as to his right to bail. We think when the legislature in one instance gives the right to bail pending the appeal but fails to give any right to bail in the other instance, it is equivalent to denying the right to bail in the latter case." See also 2 Sutherland, Statutory Construction § 4915 (3d ed. 1943).

Again, in State ex rel. Stringer v. Quigg, 107 So. 409, 411 (Fla. 1926), the court held:

"Authority for interstate rendition of fugitives by extradition emanates solely from the power delegated to the federal government by the Constitution of the United States . . . Legislation as to interstate rendition of fugitives being within the

power of Congress, the federal law upon that subject is paramount to state Constitution and statutes. [Citation omitted.] When the executive warrant of rendition has been issued, the fugitive is then held solely upon that authority. His detention is not for the purpose of trying him in the courts of this state, for he is charged with no offense against our laws, but he is apprehended and detained for the sole purpose of rendition to the demanding state."

Van Sickle argues that article 1, section 7, of the Nevada Constitution[6] is controlling in his case and that therefore he has a constitutional right to bail.[7] This argument has been well answered in State ex rel. Stringer, supra, 107 So. at 412, where the court ruled:

"This provision of the Constitution of Florida [a provision identical to Nevada's but for the immaterial substitution of the word "except" for "unless"], one of the greatest bulwarks of personal liberty, should not be narrowly or illiberally construed. On the other hand, it should not be enlarged beyond its plain sphere of operation. The quoted provision of our Declaration of Rights, except as to those persons expressly excluded by its terms, unquestionably affords the right to bail to all persons who are charged with or who may be convicted of crime under the laws of the state of Florida, but in the present state of the law we do not regard its provisions as applicable to one who is charged with an offense under the laws of another state, and who is before the courts of this state for the sole purpose of determining the lawfulness of his detention under an executive

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6. Nevada Const., art. 1, § 7:

"All persons shall be bailable by sufficient sureties; unless for Capital Offenses when the proof is evident, or the presumption great."

7. Even when a defendant is charged with a capital case in Nevada, the usual procedure is not to grant bail until after the preliminary hearing has been held and the magistrate has had an opportunity to review the evidence offered by the state to determine whether "the proof is evident, or the presumption great." The impracticability of such a review and determination by a Nevada magistrate when the case originates in and is prosecuted by a sister state is patently obvious.

warrant of extradition, under which latter process this state holds him for rendition to the demanding state, and for no other purpose. Extradition laws are enacted upon the presumption that the demanding state will accord the fugitive his right to bail, and all other legal rights. When a fugitive is held under executive warrant of extradition, it is entirely appropriate and just that his right to bail be tested by the laws of the demanding state, where he is charged with crime, and where his guilt or innocence must be judicially determined, and not by the laws of the asylum state which holds him solely for the purpose of rendition."

Likewise, in Waller v. Jordan, supra, the court held, 118 P.2d at 452:

"Appellant points to section 22, Article II of the state Constitution reading: 'All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.' [Again, a provision identical to Nevada's but for the immaterial substitution of the word "except" for "unless."] and insists that it gives him the right to bail pending his appeal . . . It should be remembered that this provision and all others of our constitution relating to criminal proceedings have application only to those crimes over which the state authorities have jurisdiction by virtue of their having been committed in the state." (Emphasis added.)

The reason for the rule has been well expressed in Buchanan v. State ex rel. Weiss, 166 So.2d 596, 597 (Fla. App. 1964):

". . . One of the reasons supporting the rule against granting bail in extradition cases where the fugitive has been reduced to custody by the execution of a governor's rendition warrant, is because the offense is not one cognizable in the courts of the asylum state, whereas the demanding state has all of the facilities to determine the gravity of the offense, the amount of bail, if any, and the conditions thereof. Here there is no re-

straint on the respondent's leaving the jurisdiction. The integrity of the processes of the courts of Florida as well as the solemnity and dignity we should accord the request of a demanding sister state, places in jeopardy the ability of this state to produce the prisoner for delivery to the demanding state when the time arrives."

See also Ex parte Campbell, 23 N.W.2d 698 (Neb. 1946); Tomarchin v. Kelly, 118 So.2d 788 (Fla. App. 1960); Llerandi v. Blackburn, 97 So. 2d 247 (Fla. 1957); Ex parte Massee, 79 S.E. 97 (S.C. 1913); Annot., 56 A.L.R.2d 668 (1957).

We therefore vacate the order of the district judge admitting Van Sickle to bail as having been entered without jurisdiction.

Collins, C. J., and Batjer, J., concur.

THOMPSON, J., with whom ZENOFF, J., concurs, dissenting:

This original proceeding in certiorari tests the power of the district court to grant bail to a fugitive from justice charge with having committed a capital offense in a sister state.

By criminal complaint, the State of California has charged Jack Van Sickle with conspiracy to commit murder, a capital offense. A warrant for his arrest was issued. Van Sickle was apprehended in Nevada and committed to jail. In due course, the Governor of Nevada issued an executive warrant directing the Nevada authorities to deliver Van Sickle to California agents for conveyance to that state to stand trial upon the charge. In accordance with the command of the Uniform Criminal Extradition Act, Van Sickle was taken before the court and informed of his rights, especially of his right to challenge the legality of his arrest by habeas.[1] He did so and, in addi-

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1. NRS 179.197:

"1. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him has appointed to receive him unless he is first taken forthwith before a judge of a court of record of this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel.

"2. If the prisoner or his counsel state that he or they desire to test the

tion, petitioned for admission to bail. His petition for bail was granted and bail fixed in the sum of $10,000. Bail was furnished and Van Sickle released from confinement pending disposition of his challenge to the validity of his arrest. This certiorari proceeding was then commenced by the State since the remedy of appeal in these circumstances is not granted. Ex parte Wheeler, 81 Nev. 495, 500, 406 P.2d 713 (1965).

1. The State's challenge to the power of the district court to grant bail rests mainly upon NRS 179.207 and NRS 179.209[2] of the Uniform Criminal Extradition Act which allows bail before issuance of the executive warrant (unless the offense is one punishable by death or life imprisonment in the demanding state), but is silent as to the right to bail after the governor's warrant has been issued. This legislative silence is interpreted by the state to mean that bail is precluded in all extradition matters after issuance of the governor's warrant. This contention finds support in the case of Allen v. Wild, 86 N.W.2d 839,

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legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus.

"3. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody and to the agent of the demanding state."

2. NRS 179.207: "If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under NRS 179.189, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time, not exceeding 30 days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused gives bail as provided in NRS 179.209, or until he is legally discharged."

NRS 179.209: "Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the governor of this state."

841-42 (Iowa 1957), where the court observed that since the act contained no similar provision for bail after arrest upon the governor's warrant, it may be inferred that the omission of such provision was intentional. Moreover, the State contends that the mentioned statutes preclude bail in all cases where the offense charged by the demanding state is punishable by death or life imprisonment.

2. The underlying fallacy of the State's position is the asumption that a legislative grant of power is essential before a court in this state may grant bail in an extradition matter. Our Nev. Const. art. 1, § 7, provides that "all persons shall be bailable by sufficient sureties; unless for Capital Offenses when the proof is evident or the presumption great." That provision does not exclude persons in custody by reason of an extradition proceeding. Application of Haney, 289 P.2d 945 (Idaho 1955). It is not confined to persons in custody for crimes committed in Nevada. Neither does it preclude bail to one charged with a capital offense where the proof is not evident nor the presumption great. Ex parte Wheeler, 81 Nev. 495, 406 P.2d 713 (1965). The court's power to grant bail stems from that constitutional provision and may not be diminished by legislative action or an interpretation of legislative silence. There is nothing contained in the U.S. Constitution art. IV, § 2, concerning interstate extradition which touches the problem before us.

3. Several statutes have been enacted to accommodate our constitutional provision for bail. NRS 34.360 provides that every person restrained of his liberty under "any pretense whatever" may petition for habeas. The "pretense" in this case was the warrant of the Governor of the State of Nevada. The Uniform Extradition Act itself, NRS 179.197, contemplates habeas to test the legality of his arrest. NRS 34.530 expressly makes habeas available for the purpose of giving bail to one in custody on "any" criminal charge. These provisions of our statutes accommodate the constitutional command.

Acceptance of the State's position that the court lacks power

to grant bail after the executive warrant has issued would deny meaning to these code provisions. Moreover, such position places a penalty upon the fugitive's right to challenge the legality of his arrest and might effectively force a waiver of that right since the price of exercising it — jail, until his challenge is resolved by the court — may be too great.

4. The offense with which Van Sickle is charged by the State of California is a capital offense under the law of that state. The California Constitution with respect to bail, art. 1, § 6, is identical to our art, 1, § 7. In California, as here, an accused in a capital case may not be admited to bail when the proof is evident or the presumption great. Conversely, he is entitled to release on bail where the proof is not evident nor the presumption thereof great. People v. Tinder, 19 Cal. 539 (1862). To this extent California law is the same as ours. Ex parte Wheeler, 81 Nev. 495, 406 P.2d 713 (1965). The determination of whether the proof is evident is discretionary [NRS 178.484(2); Ex parte Wheeler, supra, at 500] and not reviewable by certiorari [Marshall v. District Court, 79 Nev. 280, 382 P.2d 214 (1963)] since that writ concerns only jurisdiction. I would dismiss this proceeding.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,

vs.

SECOND JUDICIAL DISTRICT COURT, STATE OF NEVADA, COUNTY OF WASHOE,
Respondent.

ORDER DENYING REHEARING

Good cause appearing,

IT IS ORDERED that rehearing be, and the same hereby is denied.

DATED: August 18, 1970.

Collins, C. J., Zenoff, Batjer, Mowbray, Thompson, J. J.

cc: Counsel of record

APPENDIX C

West's Ann. Cal. Penal Code, §182.1

"If two or more persons conspire:

"1. To commit any crime.

". . .

"They are punishable as follows:

"When they conspire to commit any crime against the person of any official specified in subdivision 6, they are guilty of a felony and are punishable by imprisonment in the state prison for not less than 10 years.

"When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony . . .'

West's Ann. Cal. Penal Code, §187:

"Murder is the unlawful killing of a human being, with malice aforethought."

West's Ann. Cal. Penal Code, §190:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life."

Nevada Revised Statutes, §199.140:

"Every person convicted of a gross misdemeanor shall be punished by imprisonment in the county jail for not more than 1 year, or by a fine of not more than $1,000, or by both fine and imprisonment, unless the statute in force at the time of commission of such gross misdemeanor prescribed a different penalty."

Nevada Revised Statutes, §199.480:

"Whenever two or more persons shall conspire:

"1. To commit a crime;

* * *

every such person shall be guilty of a gross misdemeanor."

Nevada Revised Statutes, §179.209:

"Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the governor of this state."